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Peter Bragg

ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION

In re Applications of:)	
)	
MARTIN HOFFMAN)	
)	No. 97-128
TRUSTEE IN BANKRUPTCY FOR)	
ASTROLINE COMMUNICATIONS)	
COMPANY LIMITED PARTNERSHIP)	

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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)	No. 97-128
TRUSTEE IN BANKRUPTCY FOR)	
ASTROLINE COMMUNICATIONS)	
COMPANY LIMITED PARTNERSHIP)	

Courtroom 2
FCC Building
2000 L Street, N.W.
Washington, D.C.

Monday,
September 28, 1998

The parties met, pursuant to the notice of the
Judge, at 10:30 a.m.

BEFORE: HON. JOHN M. FRYSIAK
Administrative Law Judge

APPEARANCES:

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Kent W. Davenport	427	--	--	--	--
	433	--	461	--	--
By Atty. Cole	--	444	--	--	432
By Atty. Withers	--	457	--	--	--
Carter S. Bacon, Jr.	465	521	--	--	--

E X H I B I T S

	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
<u>Trustee Ramirez TIB:</u>			
13	430	433	--
14	431	434	--
15	522	523	--
<u>Shurberg:</u>			
41	Prev.	471	--
54	Prev.	474	--
55	Prev.	476	--
57	Prev.	519	--
60	Prev.	516	--
62	Prev.	516	--
67	Prev.	520	--
68	Prev.	488	--
72	Prev.	491	--
89	Prev.	495	--
142	482	483	--
143	504	--	--
144	509	--	--
145	513	--	--

Hearing Began: 10:35 a.m. Hearing Ended: 3:45 p.m.
 Recess Began: 11:30 a.m. Recess Ended: 2:00 p.m.

1 P R O C E E D I N G S

2 JUDGE FRYSIAK: Good morning, all.

3 ALL: Good morning, Your Honor.

4 JUDGE FRYSIAK: All set?

5 MS. SCHMELTZER: Your Honor, I just have one
6 preliminary matter. On Friday, I gave everybody a corrected
7 copy of Exhibit 3, which are the Bankruptcy Court decisions.
8 The only correction is that they are paginated so that it
9 will make it easier for people to refer to. The order of
10 the decisions is the same as it was in the prior exhibit.

11 JUDGE FRYSIAK: Okay. Thank you.

12 MS. SCHMELTZER: I left one for Your Honor as
13 well.

14 JUDGE FRYSIAK: Any other preliminary matters?

15 MR. COLE: Your Honor, just following up on the
16 question of Joint Exhibit 6 and Mr. Ramirez's reappearance,
17 I have spoken with Ms. Schmeltzer briefly this morning and
18 advised her that there was only one question that I would
19 like to ask Mr. Ramirez, but I think it is something we can
20 stipulate to. I asked her if she would be willing to
21 stipulate, and I believe she has it under advisement.

22 Just for the record, Mr. Ramirez, during his
23 testimony, referred to a number of law firms that had
24 represented AstroLine over the course of its history. One
25 was Peabody & Brown in Boston, One was Schatz & Schatz in

1 Hartford, and he also mentioned a Los Angeles firm that
2 represented AstroLine I believe in connection with the Faith
3 Center litigation out in Los Angeles.

4 I had failed during my examination of Mr. Ramirez
5 to identify that firm specifically for the record. I
6 believe we can all agree that it was Thielen, Marin, Johnson
7 & Bridges, but I have asked Ms. Schmeltzer if she would
8 stipulate to that, and she has that under advisement.

9 If she is willing to stipulate to that or if all
10 parties are willing to stipulate to that, then I would not
11 need Mr. Ramirez back on Thursday.

12 JUDGE FRYSIK: Okay. All right.

13 MS. SCHMELTZER: Your Honor, Trustee Ramirez TIB's
14 calls Mr. Kent Davenport to the stand.

15 JUDGE FRYSIK: Sir, before you sit down let me
16 take your oath. Please raise your right hand.
17 Whereupon,

18 KENT W. DAVENPORT

19 having been first duly sworn, was called as a witness herein
20 and was examined and testified as follows:

21 JUDGE FRYSIK: Have a seat. For the record, will
22 you please state your full name and address?

23 THE WITNESS: Kent W. Davenport, 58 Braidel Road,
24 Weston, Massachusetts.

25 JUDGE FRYSIK: Thank you.

1 DIRECT EXAMINATION

2 BY MS. SCHMELTZER:

3 Q Mr. Davenport, what is your occupation?

4 A I'm a tax accountant.

5 Q What firm are you employed with?

6 A Arthur Andersen.

7 Q What is your position with that firm?

8 A I am a tax partner.

9 Q How long have you been affiliated with Arthur
10 Andersen?

11 A Since 1977.

12 Q Can you tell us what your educational background
13 is?14 A I have a degree in accounting from the University
15 of Illinois and a J.D. from the University of Illinois.

16 Q What division do you work with at Arthur Andersen?

17 A The tax division.

18 Q Are you a certified public accountant?

19 A Yes, I am.

20 Q You began working at Arthur Andersen in 1977, I
21 believe you said. Did there come a time that Arthur
22 Andersen began doing tax related work for a company by the
23 name of AstroLine Communications Company Limited
24 Partnership?

25 A Yes, around May of 1985.

1 Q Were you brought in to work on the, and I am going
2 to refer to AstroLine Communications Company Limited
3 Partnership as either ACCLP or AstroLine during my
4 questioning. Were you brought in to work on the ACCLP
5 account in approximately May of 1985?

6 A Yes, I was.

7 Q Why were you brought in to work on the ACCLP
8 account?

9 A I had prior experience with other broadcasting
10 companies.

11 Q Now, at the time that you began providing
12 services, tax related services, to ACCLP, do you recall what
13 the structure of the company was?

14 A It was a limited partnership with Rich Ramirez as
15 a general partner, another corporation as a general partner,
16 and AstroLine Company as the limited partner.

17 Q Was the other corporation WHCT Management, Inc.?

18 A I believe so, yes.

19 Q In the course of providing tax services to ACCLP,
20 who was your contact in the company?

21 A For ongoing services it was Rich Ramirez and Al
22 Rozanski primarily.

23 Q Can you identify for the record who Rich Ramirez
24 was?

25 A Rich Ramirez was the individual who actually was

1 running the station in Hartford.

2 Q And can you identify for the record who Al
3 Rozanski was?

4 A He was an employee of the company who dealt with
5 the financial aspects, the controller of sorts.

6 Q Do you remember any contacts with either Fred
7 Boling, Jr., or Herbert Sostek?

8 A Yes. I met both of them and had meetings or
9 conference calls with them primarily discussing the
10 structuring of the partnership.

11 Q And when did those calls or conferences occur?

12 A Primarily in around May of 1985.

13 Q Following May of 1985, did you continue to be in
14 contact with Mr. Ramirez?

15 A Yes.

16 Q How often were you in contact with Mr. Ramirez?

17 A It would vary. I mean, I would go down to the
18 station I would say at least once a year, possibly more, but
19 also I would talk to Rich on the phone. Also, Rich would be
20 in our office occasionally. I would see him at that point.

21 MS. SCHMELTZER: All right, Mr. Davenport. I
22 would like to show you a series of memos. The first one is
23 Shurberg Broadcasting Exhibit 38. You have a copy of it up
24 there. Actually, I am going to bring you a copy. This has
25 previously been received into evidence as Shurberg

1 Broadcasting Exhibit 38, and that is a memo dated May 6,
2 1985.

3 The second memo that I am going to give you is,
4 Your Honor, I would like to have identified for the record
5 as Trustee Ramirez TIB's Exhibit 13 a two-page memo from
6 Kent W. Davenport to it says Memorandum for the File. It is
7 dated May 13, 1985.

8 JUDGE FRYSIAK: That may be marked.

9 (The document referred to was
10 marked for identification as
11 Trustee Ramirez TIB's Exhibit
12 No. 13.)

13 MS. SCHMELTZER: I am giving two copies to the
14 court reporter and a copy to everyone else.

15 The third memo, Mr. Davenport, that I would like
16 you to look at has previously been received into evidence as
17 Shurberg Broadcasting Exhibit 40, and I will give you a copy
18 of that. Mr. Davenport, that has a cover letter with your
19 signature that is dated May 24, and following that is a memo
20 dated May 14.

21 Finally, the fourth memo is, Your Honor, I would
22 like to have this identified for the record. This is a
23 two-page memo dated October 16, 1985, from George R. Nebel,
24 and it says for Roger Eastman.

25 JUDGE FRYSIAK: It may be marked.

1 (The document referred to was
2 marked for identification as
3 Trustee Ramirez TIB's Exhibit
4 No. 14.)

5 MS. SCHMELTZER: I am giving two copies to the
6 court reporter and a copy for everybody else.

7 I believe that I asked that that last item be
8 identified as Trustee Ramirez TIB's Exhibit 14. Is that
9 correct?

10 JUDGE FRYSIK: Yes, you did.

11 MS. SCHMELTZER: Thank you.

12 BY MS. SCHMELTZER:

13 Q Looking at these memos, Mr. Davenport, first if I
14 may ask you about that? Let me just ask you about Shurberg
15 Broadcasting Exhibit 38, which is the May 6, 1985, memo. Is
16 that a memo that you prepared?

17 A Yes.

18 Q And did that follow some discussions that you had?

19 A Yes, I assume it did. We probably met, and this
20 is a consequence of our meeting.

21 Q The second memo, Mr. Davenport, is the May 13
22 memo, which has been identified as Trustee Ramirez TIB's
23 Exhibit 13. Is that a memo that you prepared?

24 A Yes.

25 Q And did that follow a meeting that you had?

1 A Yes, apparently. A May 7 meeting.

2 Q It refers to a meeting on May 7, 1985, --

3 A Yes.

4 Q -- that you had with Roger Eastman, Fred Boling
5 and Rich Ramirez?

6 A Yes.

7 Q Do you recall that?

8 A I don't specifically recall the meeting, but --

9 Q Do you recall preparing the memo?

10 A I don't specifically recall preparing the memo,
11 but I'm comfortable that I prepared this memo.

12 MS. SCHMELTZER: Your Honor, I would ask that the
13 May 13, 1985, memo, which has been marked as Trustee Ramirez
14 TIB's Exhibit 13, be received in evidence.

15 MR. KENNEDY: Your Honor, I would just like to
16 inquire as to the handwriting that appears in the left-hand
17 column.

18 JUDGE FRYSIK: Yes.

19 VOIR DIRE EXAMINATION

20 BY MR. COLE:

21 Q Do we know whose handwriting that is?

22 A That is my handwriting.

23 Q Could you read that into the record, because I am
24 having trouble making it out?

25 A I believe it says, "Per 5-13 discussion, this

1 approach will change. The Roses will join AstroLine Company
2 as partners, and all assets in AstroLine Company other than
3 its interest in AstroLine Communications will have been
4 transferred out."

5 MR. COLE: I have no objection.

6 JUDGE FRYSIAK: All right. Received.

7 (The document referred to,
8 having been previously marked
9 for identification as Trustee
10 Ramirez TIB's Exhibit No. 13,
11 was received in evidence.)

12 DIRECT EXAMINATION RESUMED

13 BY MS. SCHMELTZER:

14 Q Shurberg Broadcasting Exhibit 40, Mr. Davenport,
15 is a memo dated May 14, 1985. Is that a memo that you
16 prepared?

17 A Yes.

18 Q And that reflects the conference call you had on
19 the 13th? Is that correct?

20 A Yes.

21 Q Now if you would just turn to what has been marked
22 as Trustee Ramirez TIB's Exhibit 14? That is the
23 October 16, 1985, memo from George Nebel to Roger Eastman.
24 Can you identify for the record who George Nebel is?

25 A George Nebel was my counterpart on AstroLine

1 Communications on the audit side. He was initially the
2 audit manager and subsequently became the audit partner on
3 the client.

4 Q And can you identify for the record who Roger
5 Eastman is?

6 A Roger Eastman was the original audit partner on
7 AstroLine Communications. He has since retired.

8 Q And do you recall having seen this memo before?

9 A Yes.

10 MS. SCHMELTZER: For the record, Your Honor, this
11 memo came out of Arthur Andersen files in response to a
12 subpoena request for Shurberg.

13 I would move that what has been marked for
14 identification as Trustee Ramirez TIB's Exhibit 14 be
15 received in evidence.

16 MR. COLE: No objection, Your Honor.

17 JUDGE FRYSIK: All right. Received.

18 (The document referred to,
19 having been previously marked
20 for identification as Trustee
21 Ramirez TIB's Exhibit No. 14,
22 was received in evidence.)

23 BY MS. SCHMELTZER:

24 Q Mr. Davenport, did this memoranda reflect
25 conversations that you had about the structure of ACCLP in

1 May of 1985 other than the last memo, of course?

2 A Yes, they do.

3 Q Let me first clarify one point that Mr. Shurberg
4 asked you about. Mr. Shurberg asked you about the notation
5 that is on the left-hand side of the May 13, 1985, memo.

6 If you would look at the May 14, 1985, memo, does
7 that address the notation? I am specifically referring to
8 Paragraph 1?

9 A Yes. I believe that is sort of summarizing the
10 notation.

11 Q Now, in May of 1985, as the tax partner at Arthur
12 Andersen who was in charge of ACCLP's tax matters, did you
13 come to recommend a special tax allocation to the
14 partnership?

15 A What we did was we brought it to their attention
16 that if they were to follow a certain allocation approach
17 that they would have certain consequences. It was
18 ultimately their decision as to whether or not to implement
19 that approach.

20 Q And is your suggested tax allocation discussed in
21 the May 13 memo?

22 A Yes, it is.

23 Q Can you describe how this special tax allocation
24 was to work?

25 A The general concept is that to the extent the

1 limited partners are putting forth the money to finance the
2 transaction that they basically get a special allocation of
3 those losses during the earlier years, and then
4 subsequently, once the venture become profitable, they
5 receive a special allocation to in essence reimburse them
6 for those prior allocated losses to get everyone back at a
7 starting even playing field, and then you have your regular
8 allocations come back into play at that point in time.

9 Q Is this a special allocation that you have seen
10 used elsewhere for businesses?

11 A Yes. It's fairly common.

12 Q What kind of businesses was it used for?

13 A I've seen it in venture capital partnerships, real
14 estate partnerships.

15 Q Have you seen other situations such as venture
16 capital situations or real estate situations where one of
17 the partners had a carried interest?

18 A Yes.

19 Q Have you seen other situations where a general
20 partner might have had a carried interest of approximately
21 20 percent?

22 A Yes.

23 Q Is there any legislation concerning use of these
24 special allocations?

25 A Subsequent to these memos, there has been some

1 legislation which tends to make it more common to allocate
2 losses to the partners who have actually contributed the
3 funds that finances those losses.

4 Q In May of 1985, do you know whether the partners
5 were optimistic or pessimistic about the success of WHCT?

6 A They were very optimistic.

7 MR. COLE: Objection. Hearsay.

8 JUDGE FRYSIK: Well, it has been answered, but he
9 may very well know.

10 BY MS. SCHMELTZER:

11 Q Mr. Davenport, I would like you to look at what
12 has previously been received in evidence as Shurberg
13 Broadcasting Exhibits 7, 8, 9 and 10, and they should be in
14 front of you on the witness stand.

15 If you will turn first to Trustee Ramirez TIB's
16 Exhibit 7? If you will just look at the page right after
17 the cover sheet? This is a 12 page document.

18 Mr. Davenport, this exhibit states that it is a
19 financial statement as of December 31, 1985, together with
20 auditor's report, and it is on the stationery of Arthur
21 Andersen & Company. Do you know if this was prepared by
22 Arthur Andersen & Company?

23 A Yes, it was.

24 Q What materials would Arthur Andersen use in
25 preparing this financial statement?

1 A In preparing any audit, they would look at the
2 relevant financial documents that they felt necessary in
3 order to render their opinion. They would include
4 organization documents, other financial documents such as
5 contracts, potential invoices, whatever they felt necessary
6 under the circumstance.

7 Q I would like you to turn to page 7, and if you
8 would just read the last two paragraphs?

9 A "The capital and..." --

10 MS. SCHMELTZER: You can read them to yourself.
11 Sorry.

12 JUDGE FRYSIAK: The last two?

13 MS. SCHMELTZER: Yes.

14 (Pause.)

15 BY MS. SCHMELTZER:

16 Q Have you read that?

17 A Yes.

18 Q Is that consistent with your understanding of the
19 way the special tax reallocation worked?

20 A Yes.

21 Q Now if you would just look at Trustee Ramirez
22 TIB's Exhibits 8, 9 and 10 and tell us if those reports were
23 also prepared by Arthur Andersen & Company for AstroLine
24 Communications Company Limited Partnership?

25 A Yes, they were.

1 MS. SCHMELTZER: Now, Mr. Davenport, I would like
2 you to turn your attention to Shurberg Broadcasting Exhibits
3 25, 26, 27 and 28. They would be in the black book, the
4 black binder. I would like to refer you to Exhibit 26.

5 I am sorry. This is not paginated. Let me just
6 assist the witness, Your Honor.

7 JUDGE FRYSIK: All right.

8 MS. SCHMELTZER: All right. This is the 1985 tax
9 return for Richard Ramirez, and there are numbers in there.
10 The numbers say Profit Sharing, and first it says 21
11 percent, and then the next column, End of Year, is 0.75
12 percent.

13 Then there is a line item for Loss Sharing, which
14 begins at 21 percent and says End of Year, 0.75 percent, and
15 then finally there is a line for Ownership of Capital that
16 begins with 21 percent and at the end of the year shows .075
17 percent.

18 JUDGE FRYSIK: What page are you on?

19 MS. SCHMELTZER: I am sorry, Your Honor.

20 MR. COLE: I am sorry. I apologize for the lack
21 of pagination. I believe it is page 22 in Exhibit 26.

22 JUDGE FRYSIK: I will have to count them out.

23 (Pause.)

24 JUDGE FRYSIK: All right. Go ahead.

25

1 BY MS. SCHMELTZER:

2 Q Now, Mr. Davenport, you have told us about the
3 special tax reallocation for AstroLine. Can you explain how
4 that works in relation to the numbers that are on this page?

5 A Okay. Profit and Loss, the first two numbers,
6 that basically tells how the profits and losses earned by
7 the partnership in this particular year would be allocated.
8 Those would be consistent with the revised allocation.

9 The Ownership of Capital number, that in theory is
10 how the assets would be distributed if the partnership were
11 liquidated at this point in time or during the period in
12 which the K-1 covers.

13 In an ongoing business, especially if a
14 significant portion of the value of that business is an
15 unrecorded, intangible asset, that number has very little
16 significance. In fact, it would be very difficult to
17 determine what that number would be in a particular year in
18 which the assets are not actually being distributed.

19 Q Do you know what numbers were plugged into this
20 tax return?

21 A To the best of my understanding, the .7500 were
22 computer generated numbers that would have been generated
23 based on the percentage of the actual amounts in the lower
24 part of the return that were allocated to this particular
25 K-1.

1 Q Was one number given to the computer?

2 A No. The computer would have known what -- again,
3 it is my understanding this is the way this happened. The
4 computer would know what the total, for example, ordinary
5 income or loss was for the partnership. They would know
6 what portion of that ordinary income or loss was allocated
7 to this particular partner, who happened to be Rich Ramirez,
8 and, therefore, it would calculate that number.

9 Q And was the Ownership of Capital line computer
10 generated?

11 A To the best of my knowledge, yes.

12 Q The Profit and Loss lines, were they based on the
13 special reallocation?

14 A Yes, they would be because the actual number
15 showing up on the K-1 was based on the special allocations.

16 Q Now let's say that in 1985 the station had been
17 sold for \$10 million. Let's say that in 1985 the station
18 was sold for \$20 million, which was approximately \$10
19 million more than had been put into the station. How would
20 the profits be allocated?

21 A First, the profits would be allocated to restore
22 the limiteds for prior allocated losses. Then -- to the
23 extent of their capital contributions. Then I believe they
24 received a special allocation to cover the interest on those
25 capital contributions.

1 The next amount, which I believe was a \$1 million
2 special allocation, that would have gone to Rich Ramirez and
3 Thomas Hart, then the remainder would revert to the original
4 70/30 allocation that was originally provided for in the
5 partnership agreement and which the amended agreement
6 provides that it relates back to once the prior special
7 allocations are accounted for.

8 Q And so 30 percent would go to the general partners
9 after the limited partners had been paid back for their
10 capital contributions?

11 A After the limited partners had been paid back for
12 their capital contributions, the interest component and
13 Richard Ramirez and Thomas Hart got their special allocation
14 of the \$1 million. Then all subsequent amounts would be
15 allocated at 70 percent/30 percent.

16 Q So let's assume for purposes of your example that
17 the station was sold for \$20 million in 1985, at the end of
18 1985, that all the expenses turned out to be \$10 million.

19 How would the profit be divided up, the \$10
20 million profit? Would that be divided up 70 percent to the
21 limiteds/30 percent to the generals?

22 A Again, once you've allocated enough to recoup the
23 limiteds for their capital contributions, the amount that
24 had been previously allocated, plus the interest component,
25 then I believe there is a special allocation of \$1 million.

1 Assuming we've done all of that and there is \$9
2 million left, yes, that \$9 million would be allocated 30
3 percent to the generals/70 percent to the limiteds.

4 Q And assuming that Mr. Ramirez was a 21 percent
5 general partner, what would he have received?

6 A If he were 21 percent of the 30 percent, he would
7 get 21/30ths of the amount allocated to the generals.

8 Q Do you know in your head what Mr. Ramirez would
9 have received as a 21 percent general partner? Can you
10 mathematically do that?

11 A Of what amount?

12 Q Out of \$9 million in profits.

13 A Well, whatever 21 percent of \$9 million is.
14 Roughly \$1.8 million.

15 Q Now, does this tax return that was prepared at the
16 end of 1985 reflect what occurred during 1985?

17 A Right. The tax return -- the purpose of the tax
18 return is to reflect history, so this is telling what
19 happened in 1985. This is how that tax information should
20 be allocated to the partners for purposes of their preparing
21 their related tax returns for 1985.

22 Q Does this tax return predict the future in any
23 way?

24 A No.

25 Q If you will just look through the tax returns,

1 which are 25, 26, 27 and 28, and I specifically would like
2 you to look at the page with Mr. Ramirez at the top, if you
3 can find that?

4 (Pause.)

5 A Okay.

6 Q Are these tax returns consistent with the
7 financial statements that were prepared by Arthur Andersen?

8 A Yes, they would be.

9 MS. SCHMELTZER: That is all I have, Your Honor.
10 Mr. Davenport is available for cross-examination.

11 JUDGE FRYSIK: All right. Thank you.

12 MR. COLE: Good morning, Mr. Davenport.

13 JUDGE FRYSIK: Mr. Cole?

14 MR. COLE: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. COLE:

17 Q Good morning, Mr. Davenport. We have met briefly
18 before. My name is Harry Cole, and I am counsel for
19 Shurberg Broadcasting in this proceeding.

20 Mr. Davenport, just for clarification of the
21 record, earlier on in your examination in response to
22 questions from Ms. Schmeltzer you and she both spoke in
23 terms of a carried interest. Do you recall that testimony?

24 A Yes.

25 Q What do you understand the term carried interest

1 to mean?

2 A Carried interest is an interest a partner gets in
3 a partnership that is attributable to considerations other
4 than his capital contributions to the partnership.

5 Q Would that, for example, be a sweat equity?

6 A It could be, yes.

7 Q In your experience as an accountant, is it your
8 understanding that such carried interests -- strike that.
9 That the partnership agreement would provide specifically
10 for such carried interests?

11 A Yes. It's very common to have a partnership
12 agreement to provide for such carried interest.

13 Q And in a situation such as that, am I correct that
14 the partnership agreement would specifically state that the
15 partners agree that Mr. So and So, a general partner, has
16 accorded his interest in return for services rendered?

17 A It's not always necessarily for services rendered
18 as an employee. You can get carried interest for various
19 reasons, I think.

20 Q But the reasonable basis on which the carried
21 interest is being granted, that would be reflected in the
22 partnership agreement, would it not?

23 A It doesn't have to be stated why the carried
24 interest, but the partnership agreement would establish
25 basically what the carried interest is.

1 I mean, carried interest may be a slang term for
2 the concept of giving someone an interest in excess of their
3 relative capital contribution, but it's pretty generally
4 accepted.

5 Q I understand that. What I am trying to get at is
6 whether or not the partnership agreement itself, in your
7 experience, would normally reflect the basis on which the
8 carried interest is being issued?

9 A I am sorry. What do you mean, the basis as to --

10 Q I am sorry. I do not mean the accounting term
11 basis. I mean the consideration which is being expected of
12 the partner in return for his or her carried interest.

13 A No, not necessarily. It doesn't have to do that.
14 In fact, I would say the ones I've seen it maybe is not
15 specifically stated in the partnership agreement.

16 Q How is it stated in the partnership agreement, if
17 at all?

18 A It's just the way the allocations work.

19 Q Now, Ms. Schmeltzer asked you a number of
20 questions about the K-1s. That is the tax returns which
21 appear in Shurberg Exhibit Nos. 26, 27 and 28. Do you
22 recall that testimony?

23 A Yes.

24 Q I believe you testified that the numbers, and now
25 I am going to focus all my examination at this point with

1 respect to these tax returns on Block No. D or Paragraph No.
2 D in the upper right-hand corner, which I believe is what
3 she asked you about. That is the question which reads under
4 Partner's Percentage of Profit Sharing, Loss Sharing and
5 Ownership of Capital.

6 Am I correct that you testified that the Ownership
7 of Capital line was in effect completed by the computer?

8 A To the best my knowledge, that would have been a
9 number generated by the computer. We prepare our tax
10 returns using computer software. You input certain
11 information, and it will generate certain information.

12 Q But you as the tax partner would have reviewed
13 this after it came out of the computer, would you not have?

14 A I probably would not have focused on those numbers
15 because again, as long as I was comfortable that the numbers
16 being reported to the shareholders that they were going to
17 be including in their tax return were correct, that's what I
18 would focus on primarily.

19 Q These are numbers that were included in their tax
20 return, were they not?

21 A No. Those percentages will not show up in their
22 tax returns.

23 Q I am sorry. The K-1 is not being filed with the
24 IRS?

25 A The K-1 is being filed with the IRS by the

1 partnership.

2 Q So this is not to be included with their
3 individual tax returns?

4 A What they will do in their individual tax returns,
5 as I understand it, is they will pick up the appropriate
6 income/loss numbers and then report those income/loss
7 numbers in their tax return. You are not required to
8 attache your Schedule K-1 to your tax return.

9 Q Is it accurate to say that the Ownership of
10 Capital line entry on the K-1 form refers to the extent of
11 the partner's equity contributions to the partnership's
12 capital?

13 A No. If you go to the instructions that tell you
14 how to complete this form, the ownership of capital is an
15 indication as to how the assets would be distributed upon
16 liquidation of the partnership.

17 Q And you testified, as I recall, that this reflects
18 history, what happened in 1985? In other words, if the
19 partnership had been liquidated as of the end of 1985, this
20 is what the ownership of capital would have looked like? Is
21 that correct?

22 A For the partnership to have been liquidated in
23 1985, I'm assuming there would have had to have been some
24 transaction to wind down the partnership activities.

25 If in fact there had been, for example, a sale of

1 the partnership assets, then the income of the partnership
2 may have been significantly higher, which could clearly
3 affect the way the assets in fact would have been
4 distributed.

5 Q But there had not been a sale as of December 31,
6 1985?

7 A That is correct.

8 Q And there had not been a sale as of December 31,
9 1986?

10 A That is correct.

11 Q Or December 31, 1987?

12 A That's correct.

13 Q Or December 31, 1988?

14 A Correct.

15 Q So the speculative exercise that you and Ms.
16 Schmeltzer engaged in with respect to a possible sale of the
17 license of the station at some point in 1985 and the numbers
18 that would be generated, that was pure speculation on your
19 part?

20 A Yes, it was.

21 Q You also testified about the verbiage which
22 appears in the Notes to the Financial Statements with the
23 auditors' report, which appears as Joint Exhibits 7, 8, 9
24 and I believe 10. Do you recall that testimony?

25 A Yes.

1 Q I believe you also testified that in preparing
2 these reports, Arthur Andersen reviewed a variety of
3 documents, including relevant financial documents,
4 organization documents and the like. Was that your
5 testimony?

6 A That would be the procedure for preparing audited
7 financial statements.

8 Q Who actually wrote the language which appears in
9 Notes to Financial Statements?

10 Right now let's just take for an example Joint
11 Exhibit No. 7, which is the 1985 financial statement as of
12 December 31, 1985, and I refer you to page 7 of that, the
13 paragraph entitled No. 1, Organization. Who wrote that?

14 A That would have been written by the audit team.
15 Exactly who on the team would have originally written it I'm
16 not certain, but then it would have gone through the various
17 levels of review by the -- for example, if a staff person or
18 a senior wrote it, then the managing partner would have
19 reviewed it. If the manager wrote it, the partner would
20 review it. Ultimately it would have gone through the
21 various levels of a review within the audit group.

22 Q When you refer to the audit group, are you
23 referring to personnel within the Arthur Andersen
24 organization?

25 A Yes.

1 Q Would this have been reviewed and edited by anyone
2 outside the Arthur Andersen organization?

3 A I do not know if it was or not.

4 Q Is it possible that it was reviewed by an attorney
5 at Peabody & Brown?

6 A It may be possible, but I have no idea if it was
7 or not.

8 Q So you yourself did not prepare this audit report?

9 A No, I didn't.

10 Q Is that correct?

11 A No, I did not.

12 Q And you yourself did not prepare this language?
13 Is that correct?

14 A That is correct.

15 Q Would the same be true of Joint Exhibit Nos. 8, 9
16 and 10, that is the other Arthur Andersen audit reports that
17 were shown to you earlier today?

18 A Yes, it would.

19 Q You mentioned earlier in your testimony, I
20 believe, and please feel free to correct me if I am wrong,
21 that when you first began representing AstroLine, and I mean
22 AstroLine Communications Company Limited Partnership, one of
23 your jobs was to consult with AstroLine's principals
24 concerning the structure of the partnership. Was that your
25 testimony?

1 A Yes.

2 Q Was it your understanding as of May of 1985 that
3 AstroLine as an entity did not exist already?

4 A No. I believe it existed.

5 Q Why did it need structuring then?

6 A Well, it may not have been structured in the most
7 tax efficient manner.

8 Q So would it be safe to assume that what you meant
9 was restructuring?

10 A Yes.

11 Q Refer, please, to Shurberg No. 38, which is in the
12 red binder. You were asked a couple of questions about this
13 by Ms. Schmeltzer. This is the memo dated May 6, 1985, from
14 you to the file.

15 A Yes.

16 Q I refer you to the first sentence, which reads, as
17 I read it, "The currently proposed profit/loss sharing ratio
18 between the general and limited partners of AstroLine
19 Communications Company is 30 percent to the generals and 70
20 percent to the limiteds." Do you see that language?

21 A Yes.

22 Q Why was that only the currently proposed sharing
23 ratio?

24 A I guess it was the current structure, the current
25 profit sharing ratios.

1 Q Do you know why you would have put currently
2 proposed ratios there if it were in fact the current ratios?

3 A Well, because, as this memo indicates, alternative
4 proposals were being considered.

5 Q Do you recall whether anyone from AstroLine
6 advised you that AstroLine had not yet been structured as of
7 May of 1985?

8 A No. I was aware that it was structured.

9 Q Were you aware that it was structured with a 30/70
10 profit/loss sharing ratio?

11 A Yes, I was.

12 Q So this memorandum is inaccurate at least to that
13 extent? Would that be correct?

14 A It was the actual profit sharing ratios at that
15 point in time. That's correct, to the best of my knowledge.

16 Q Prior to May of 1985, did Arthur Andersen
17 represent any other entity owned or controlled by Mr. Boling
18 or Mr. Sostek, to your knowledge?

19 A We did represent other entities that Mr. Boling
20 was affiliated with.

21 Q Did those include some entities which had the name
22 AstroLine in the company name?

23 A Yes, I believe. Yes, they did.

24 Q Do you know how long you represented those
25 entities prior to May of 1985?

1 A I do not know how long.

2 Q Had you done any work for them prior to May of
3 1985?

4 A Prior to 1985, I had not.

5 Q Do you know whether Mr. Nebel had?

6 A I do not know.

7 Q How about Mr. Eastman?

8 A I think Mr. Eastman probably had, but I do not
9 know for certain.

10 Q Do you know how AstroLine Communications Company
11 Limited Partnership came to be represented by Arthur
12 Andersen?

13 A I do not know. I was involved after they were
14 already associated with the firm.

15 Q Based on the memoranda that you reviewed this
16 morning from approximately May of 1985, is it correct to say
17 that the revision of AstroLine's profit/loss distribution
18 arrangement was adopted because the funding of AstroLine as
19 of approximately May of 1985 was going to be made by
20 AstroLine Company, as distinct from AstroLine Communications
21 Company Limited Partnership? Am I reading these documents
22 correctly to reach that conclusion?

23 A I'm not certain. I think maybe the ultimate
24 determination as to how the money was to go in was a
25 function of the planning.

1 Q I am sorry. Could you say that again?

2 A I think the ultimate decision as to how the money
3 would be invested into AstroLine Communications Limited
4 Partnership was something that was determined as the
5 planning process went on.

6 Q Let me refer you to Shurberg No. 40, which is also
7 in the red notebook, page 2, Paragraph 5, which reads, the
8 first sentence, at least as I read it is:

9 "Because of the change in the structuring of the
10 borrowings such that they are now at the AstroLine Company
11 level and not the AstroLine Communications level, the
12 partnership agreement will have to be revised accordingly."

13 A Right.

14 Q Now, is that a correct statement?

15 A Yes.

16 Q And does that accurately reflect then that the
17 AstroLine Communications Company Limited Partnership
18 agreement had to be changed in order to accommodate the new
19 funding arrangements which were contemplated by the parties
20 as of May of 1985?

21 A Right. Again, that was part of the overall
22 structuring, this revised structuring.

23 Q Whose idea was it to have AstroLine Company, as
24 opposed to AstroLine Communications Company Limited
25 Partnership, undertake the borrowings?

1 A I am not certain whose idea it was. I believe
2 there was an issue that in order to assure AstroLine Company
3 and its partners to be able to deduct the losses that it was
4 necessary to have the borrowing take place outside of the
5 partnership.

6 Q I am sorry. Could you say that again, please?

7 A In order to assure the deductibility of or in
8 order to make the deductibility of the losses more certain
9 at the AstroLine Company partner level, they were advised --
10 it was determined that it would be better for the debt to be
11 outside of the partnership.

12 Q The partnership being Astroline Communications --

13 A Communications Limited Partnership.

14 Q So is it accurate to say that this reorganization
15 was undertaken for the benefit of the partners of AstroLine
16 Company, as opposed to Astroline Communications Company
17 Limited Partnership?

18 A Well, from my perspective in advising the
19 partnership, the idea was to the extent you can lower the
20 overall cost of financing the partnership's, Astroline
21 Communications Company Limited Partnership's, activities,
22 you benefitted the partnership.

23 Q How did that lower the cost of financing?

24 A The parties that were providing the financing, to
25 the extent they were entitled to tax benefits on an

1 accelerated basis, that lowers their cost of obtaining that
2 financing.

3 Q In other words, their cost?

4 A That's correct.

5 Q But were they not entitled to a return of all of
6 their capital contributions plus I believe you referred to
7 interest, although the partnership agreement refers to a
8 return on that investment?

9 A Uh-huh.

10 Q So they were entitled to all of their money back,
11 were they not?

12 A Assuming the partnership was successful and was
13 able to pay that money back.

14 MR. COLE: I have nothing further, Your Honor.

15 JUDGE FRYSIK: All right. Thank you.

16 Bureau?

17 CROSS-EXAMINATION

18 BY MS. WITHERS:

19 Q Hi. I am Cathy Withers, and I represent the Mass
20 Media Bureau of the FCC. I just have a couple follow up
21 questions for you this morning.

22 You testified earlier today that you had contact
23 and meetings with Mr. Boling and Mr. Sostek early on in May
24 of 1985. To what degree did you continue to speak with them
25 after that date?

1 A In regard to partnership matters, I don't remember
2 anything specific. It may be that we were contacted to
3 provide K-1 information or estimates, but I don't really
4 remember having much contact with either of them in regard
5 to partnership matters.

6 Q I want to refer you to it is in the red binder
7 there. It is Shurberg Exhibit 101. I am sorry. The white
8 binder. I have two binders open.

9 It is a letter dated April 22, 1986, from Arthur
10 Andersen. It was signed by George Nebel. Actually, you
11 were not cc'd on it. I do not know if it is a letter that
12 is familiar to you or the form of which is familiar to you.

13 A I'm not familiar with it, but --

14 Q Do you know whether it was the common practice to
15 provide Mr. Boling with financial statements of the
16 partnership?

17 A I would think that would not be an uncommon
18 practice to provide the limited partners with copies of the
19 financial statements of a partnership.

20 Q Do you know in the second paragraph there where
21 the letter refers to a general representation letter which
22 was forwarded to Fred for his approval, do you know what
23 that refers to?

24 A A general representation letter is a letter that
25 is provided by the audit client to make certain

1 representations to Arthur Andersen and which we base our
2 opinion on, for example, that they're valid financial
3 statements and so forth, various items that they would
4 represent to us, and we would rely on those as part of our
5 audit.

6 Q What I am trying to determine is whether you know
7 why a general representation letter would be forwarded to
8 Fred Boling for his approval?

9 A I do not know.

10 Q Okay. You said earlier today that you, Arthur
11 Andersen, suggested to the partnership this profit/loss
12 allocation, but that the decision was a joint decision of
13 the partners?

14 A Well, we would provide them with an analysis or an
15 explanation of how the special allocation would work. Of
16 course, the ultimate decision would be that of the
17 partnership.

18 Q Do you recall at whose direction you came up with
19 alternatives, including a profit/loss allocation?

20 A I wouldn't say it was anyone's direction. When I
21 got involved, I would have reviewed, you know, the way that
22 the current structure was.

23 Just from my past experience dealing with
24 partnerships, the idea of having significant losses being
25 allocated to partners who are not investing the funds

1 supporting those losses and who would not be able to utilize
2 those losses would be a natural area I would have picked up
3 on and said there's another way of doing this.

4 Q Do you know who it was that communicated with you
5 as to the partners' decision in this regard?

6 A I don't remember. There was ultimately an
7 amendment to the partnership agreement.

8 Q Do you recall discussing this matter with all of
9 the partners, Mr. Boling, Mr. Sostek and Mr. Ramirez
10 primarily?

11 A Yes. We did have discussions, as illustrated by
12 this memos, and conference calls and so forth and with the
13 attorneys.

14 Q And would you say that in those discussions, all
15 of the partners had equal input or participation in those
16 discussions?

17 A I don't remember specifically, but it was more
18 Arthur Andersen sort of explaining here's how it would work.
19 Then ultimately it was out of our hands. They would make
20 the decision whether or not to amend the agreement.

21 Q And do you know how that decision was reached?

22 A I do not.

23 Q Today we have talked about the tax returns, and in
24 particular we were looking at the K-1 for Mr. Ramirez. Do
25 you recall discussing that form with Mr. Ramirez?

1 A His K-1?

2 Q Yes.

3 A I don't remember having specific discussion with
4 Mr. Ramirez about that.

5 MS. WITHERS: I have no further questions.

6 MS. SCHMELTZER: If I may just have a minute, Your
7 Honor?

8 (Pause.)

9 REDIRECT EXAMINATION

10 BY MS. SCHMELTZER:

11 Q I just have one question, Mr. Davenport. Do you
12 still have Shurberg Broadcasting Exhibit 101 in front of
13 you? That is the one that Ms. Withers just asked you about.
14 It is in the white volume, 101.

15 A Yes.

16 Q In Paragraph 2 it refers to a draft of a general
17 representation letter that you have enclosed for forwarding
18 on to Fred. Would it be a normal practice of Arthur
19 Andersen to get a general representation letter signed by an
20 officer of a general partner?

21 A Yes, or the appropriate officer of the
22 partnership. That would probably be acceptable, but I don't
23 think it has to be that person.

24 Q Would Arthur Andersen ask for general
25 representation letters from both individual general partners

1 and officers of corporate general partners?

2 A No. We would -- generally we would want a
3 representation from someone at the partnership that has the
4 authority to make that representation on behalf of the
5 partnership. In theory, it could be an employee of the
6 partnership.

7 Q Would you also need a representation letter from a
8 corporate general partner at some points in time?

9 A I do not believe so, but then that is something
10 you would probably have to discuss with my audit
11 counterpart.

12 Q This is not something that you prepared?

13 A No. This is -- this deals strictly with the
14 audit.

15 Q Deals with the audit. So a general representation
16 letter could be signed by an employee of the partnership?

17 A Well, someone -- for example, if we were to audit
18 a corporation, we would have an officer of the corporation
19 who has the authority to sign on behalf of the corporation
20 provide us with a general rep letter.

21 Q At times, in connection with auditing a limited
22 partnership did you need to also do audits of the general
23 partner that was associated with that, a corporate general
24 partner or a limited partner?

25 A I'm sorry. Could you ask that again?

1 Q In the course of doing an audit for ACCLP --

2 A Right.

3 Q -- were there occasions when you would have needed
4 a representation letter from a corporate general partner or
5 from a limited partner of the company?

6 MR. COLE: Objection. Mr. Davenport has
7 testified, I believe, that he was on the tax team, not the
8 audit team.

9 Ms. Schmeltzer is asking him a number of questions
10 which assume he is fully familiar with the audit team's
11 prophecies and procedures, and there is no foundation for
12 that as far as I can tell.

13 MS. SCHMELTZER: If he knows.

14 JUDGE FRYSIK: Will you restate or rephrase your
15 question?

16 BY MS. SCHMELTZER:

17 Q If you know, Mr. Davenport, in the course of doing
18 an audit of a limited partnership, were there occasions when
19 Arthur Andersen might need a representation letter from a
20 corporate general partner of the limited partnership or a
21 limited partner of the limited partnership?

22 A I do not believe so, but my audit counterpart
23 would probably have a better, more definitive answer on
24 that.

25 MS. SCHMELTZER: I have nothing further, Your

1 Honor.

2 MR. COLE: Nothing further, Your Honor.

3 MS. WITHERS: Nothing further.

4 JUDGE FRYSIK: Okay, Mr. Davenport. Thank you

5 very much. You are excused.

6 (Witness excused.)

7 JUDGE FRYSIK: Our next witness is not due until

8 this afternoon?

9 MR. COLE: He will be here this afternoon, Your

10 Honor.

11 JUDGE FRYSIK: Two o'clock?

12 MR. COLE: That is correct. Yes.

13 JUDGE FRYSIK: All right. We will recess until

14 2:00 p.m.

15 (Whereupon, at 11:30 a.m. the hearing was

16 recessed, to reconvene at 2:00 p.m. this same day, Monday,

17 September 28, 1998.)

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1 A F T E R N O O N S E S S I O N

2:00 p.m.

JUDGE FRYSIAK: We are on the record.

Mr. Cole?

MR. COLE: Yes, Your Honor.

Mr. Bacon, if you would please take the stand?

Your Honor, Shurberg Broadcasting has Mr. Bacon here.

Whereupon,

CARTER S. BACON, JR.

having been first duly sworn, was called as a witness herein
and was examined and testified as follows:

JUDGE FRYSIAK: Please have a seat, and for the record state your full name and address.

THE WITNESS: My full name is Carter S. Bacon, Jr.
Home address, 6 Curve Street, Sherborn, Massachusetts.

JUDGE FRYSIAK: Thank you.

DIRECT EXAMINATION

BY MR. COLE:

Q Good afternoon, Mr. Bacon. You and I have met before several months ago, but just for the record let me state I am Harry Cole, counsel for Shurberg Broadcasting of Hartford.

As a preliminary matter, it is correct, is it not, that you are appearing here pursuant to a subpoena which was

1 served on you by Shurberg Broadcasting in this proceeding?

2 A Yes.

3 Q I will just state as a matter for the record that
4 you are represented by counsel today, are you not?

5 A Yes.

6 MR. COLE: Your Honor, would you like to have
7 counsel enter an appearance?

8 JUDGE FRYSIK: Yes.

9 MR. KENNEDY: Yes. Thank you. My name is Don
10 Kennedy, Your Honor, and I am here representing Carter
11 Bacon.

12 JUDGE FRYSIK: All right. Thank you.

13 BY MR. COLE:

14 Q Mr. Bacon, you are an attorney, are you not?

15 A Yes.

16 Q When were you admitted to practice?

17 A 1979.

18 Q Are you affiliated with a law firm?

19 A Yes.

20 Q What law firm is that?

21 A Peabody & Brown.

22 Q Where is Peabody & Brown located?

23 A In Boston.

24 Q Are you a partner in Peabody & Brown?

25 A Yes.